No. 138.
Brf. of Browne & Britton for
Supreme Court of the United States.
October Term, 1899.
Filed Feb. 26, 1900.

SUPREME COURT, U. S.
FILED
FEB 26 1900
JAMES H. McKENNEY,
Clerk.

R. E. DAGGS AND A. J. DAGGS,
APPELLANTS,
vs.
THE PHŒNIX NATIONAL BANK.

No. 138.

BRIEF FOR APPELLEE.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Attys. for Appellee.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

R. E. DAGGS AND A. J. DAGGS,
APPELLANTS,
v.
THE PHŒNIX NATIONAL BANK.

No. 138.

BRIEF FOR APPELLEE.

STATEMENT.

This record presents three consolidated causes, brought by appellee to foreclose certain mortgages given by appellants to secure an indebtedness to it from appellants. The appeal properly brings up only for review the judgment of the Supreme Court of Arizona, affirming the judgment of foreclosure entered in the trial Court.

The original transcript, when filed herein, disclosed entire absence of any certified statement of facts, required by Sec. 2, Act of April 7, 1874 (18 Stats. 27), which reads:

"Provided, that on appeal, instead of the evidence "at large, a statement of the facts of the case, in "the nature of a special verdict, and also the rulings of "the court on the admission or rejection of evidence

" when excepted to, shall be made and certified by the " court below, and transmitted to the Supreme Court, to- " gether with the transcript of the proceedings and judg- " ment or decree. * * *"

Wherefore, appellants, at an early date in this term, moved and obtained writ of certiorari to cover this vital defect. Thereon the Supreme Court of Arizona has certified (Rec. 158) statement of facts in the nature of a special verdict, wherein is set forth (1) the controlling Practice Act of Arizona; (2) the judgment of foreclosure and sale entered in the trial Court, and (3) assignments of error made by present appellants in the Supreme Court of the Territory. Thereon that Court further certified as follows:

" Under the assignments of error thus made and pre- " sented in the record, this Court could and did make no " determination of the facts of the case, except such as " appeared in the pleadings and judgment, for the reason " that such of the assignments as were sufficient in form " to raise any question, presented none for our considera- " tion which necessitated the further finding of facts in " the case. We are unable to determine from the record " presented in this Court, in the absence of a bill of " exceptions and a statement of facts, what the facts were " which were put in evidence on the trial in the Court " below, further than as they are shown by the transcript " of the reporter's notes; and from such review of the " record the judgment of the District Court was affirmed " as follows:"

The Practice Act thus fully set out in such return provides in Section 4 (*inter alia*):

" The brief of the plaintiff in error or appellant shall " also next contain a distinct enumeration in the form of " propositions of the several errors relied on, and all errors

" not assigned in the printed brief shall be deemed to " have been waived."

Section 5 provides :

"All rulings made by the Court below in opposition to " the plaintiff in error or appellant shall be taken as ex- " cepted to by the party appealing or suing out the writ of " error, and when assigned as error in the brief shall be " reviewed by the Supreme Court without any bill of ex- " ception or other assignment of errors except as herein " provided."

Based upon such positive statute, the opinion of the Supreme Court of Arizona in this cause (Rec. 137), after statement of the pleadings and judgment entered thereon below, observes :

" At the outset we are compelled to call attention to the " omission of counsel to comply with the statute and the " rules of this Court on the subject of assignments of " error.

" These are imperative and must be observed. It is " not our business to search the record if perchance we " may find reversible error. It is our duty to examine " into such alleged errors, and only such as are dis- " tinctly pointed out in the record. The assignments " made by plaintiffs in error in their brief are, for the " most part, so general in character, and so wanting in " definiteness, that they cannot be considered. Although " defective as assignments, we have by liberal construction " found that two of them present questions for our re- " view. The first of these reads as follows :

" ' The Court erred in not giving judgment for plaintiffs " ' in error on their pleas in bar of the recovery of any " ' interest, for the reason that the contract with the " ' National Bank for ten per cent. interest is *ultra vires.*' "

Thereon that Court considered such assignment and upon clear reasoning and authority overruled same.

Having disposed of this point, its opinion (Rec. 140) proceeds:

"The second assignment of error as made by plaintiffs "in error reads:

"'The Court erred in overruling the plaintiffs' in error "'motion for judgment on the pleadings, for the reason "'that there was no reply to plaintiffs' in error verified "'counter claims.'

"The latter part of this assignment would appear to "indicate that what is intended is that the Court erred "in not rendering judgment for the plaintiff in error for "the amounts of the counter claims plead, because they "were not denied under oath by the defendant in error "in its reply to the amended answer filed by plaintiffs in "error."

This assignment of error is then considered at length by the Court and also overruled.

This constitutes ALL of the case found reviewable in the record as presented to the Supreme Court of the Territory.

Dissatisfied with the certified statement of facts made by the Supreme Court of the Territory and certified by it under the writ of certiorari heretofore issued, appellants recently petitioned this Court for leave to file petition for writ of mandamus against the Justices of the Supreme Court of Arizona to compel them to search the entire record and certify complete statement of facts thereon, as in assumed compliance with the Act of 1874. The Court denied the petition.

Notwithstanding all of this, counsel for appellants now file in this Court an elaborate brief, containing twenty-one separate assignments of error, going far beyond anything heard and determined in the Supreme Court of the Territory, and calling to his aid in the argument of such

numerous assignments the entire record of the cause. The plain assumption involved in such procedure is that *this Court* will thereon search the entire record in consideration of all the numerous errors now assigned, and thereby grant appellants a review of the entire cause with as full effect as if this tribunal of last resort was the Court of first instance, sitting to hear all of the evidence and to determine all of the controversy as it may have been originally presented.

Counsel for appellee must properly decline to enter upon any such enlarged field of discussion. From our understanding of this Court's repeated and fixed construction of the Act of 1874, with respect to limitation of review upon appeal to the facts as found and certified by the Court below, it would only be additional trespass upon the time and patience of the Court if we should follow the wide excursions of counsel from that part of the record which is properly open to review here and the questions of law thereon, which the Supreme Court of the Territory judicially certified as alone open to its review under the law and practice, by reason of appellants' method of presentation of their cause to that Court. It does not need the suggestion from us that having thus limited review in the Court below, appellants cannot now widen the field of argument and decision here to embrace the entire case as fully as if it were now being heard in the Court of first instance.

If it were proper for appellants to thus open the entire record precisely as if the cause were on original hearing, it would be equally proper for us to suggest as the actual facts in the case, that:

1st. This is a controversy involving indebtedness of the entire Daggs family to this appellee. It originated, in the first instance, in the indebtedness of W. A. and P. P.

Daggs to the appellee bank, and also as responsible owners of the failed bank of Tempe, Arizona, whose overdrafts were held by this appellee bank. In settlement of this aggregate indebtedness the notes and mortgages forming basis of present suit were given by appellants, A. J. and R. E. Daggs. Default in payment with consequent proper effort on the part of appellee bank to foreclose the mortgages given as security therefor has produced this protracted litigation, in plain effort of the Daggs family to avoid their just indebtedness. (Rec. 127.)

2d. And in support of that effort to assert the charge of usury against the appellee bank and to invoke the most technical rules of pleading in sustaining their alleged counter-claim.

ARGUMENT.

I.

The Defense of Usury.

This defense is fully and well considered in the opinion of the Court below. The notes of appellants given the appellee bank and forming basis of this suit provide interest at ten per cent. per annum. Appellants contend that the appellee bank has hence violated Sections 5197 and 5198 of the United States Revised Statutes, because thereby inhibited from charging or receiving more than seven per cent., and hence under Section 5198 the appellee bank must suffer forfeiture and loss of *all* interest whatsoever, upon appellants' admitted obligations here in suit.

This question assumes an importance far beyond the amount involved in present case.

If national banks in that section of the country are

limited in fact and law to seven per cent., while private or territorial banks, and all individuals in Arizona may, by the express statutory law thereof, contract or agree for any rate of interest, then it is manifest that Congress has imposed upon national banks a limitation which places them at serious disadvantage in conducting a banking business therein, with resulting discrimination which is not, in our understanding, sustained either by the letter of the national banking act or any judicial construction thereof.

At the outset, and to avoid needless repetition, we invoke the Court's examination of the opinion of the Supreme Court of Arizona herein (Rec. 138–140) as disclosing that Court's full accord with existing State authorities, summarized in the concluding words of the opinion thus:

> " In accord with the Courts of the States of California, " Colorado, Texas, and North Dakota, we have reached " the conclusion that a national bank in Arizona is privi- " leged to charge and collect any rate of interest which " may be agreed upon, and is as free to act in this regard " as are banks organized under local laws, or as individ- " uals living in the Territory."

Inasmuch as the opinion below fully cites the decisions of the highest Courts of the States thus named, we do not extend this brief with unnecessary reference thereto. Our examination of these cases discloses that the point was directly in issue in each case, and was stated and considered with great fullness. In all of these cases (as here) the law of the State or Territory, by express enactment, gave unrestricted right of contract in respect to rate of interest.

Opposing counsel sweep all of these decisions aside upon the sole assumption that the decision of this Court,

in *National Bank* v. *Johnson* (104 U. S. 271), rules the contrary. We do not so understand that decision, nor is it so understood or applied by the State Courts in the cases ruled therein since its rendition.

In *Bank* v. *Johnson*, the recited facts show that the bank discounted for Johnson, commercial paper, charging and receiving interest therefor "beyond the rate allowed by the general laws of the State." And the contention on behalf of the bank was stated by Mr. Justice Matthews in the opinion thus:

"It is contended, on behalf of the plaintiff in error, "that the sections of the Revised Statutes in question "were intended only to prevent national banks from "violating the usury laws of the State in which they were "severally organized and established; and that while, by "the law of New York, it is usurious to loan or advance "money to a party upon his own paper, or upon paper "made for his accommodation, at a greater rate of interest "or discount than seven per cent. per annum, it is not "usurious or illegal in that State for natural persons to "acquire business paper, that is, paper valid in the hands "of the holder, so that he might maintain an action "thereon against the prior parties, at any rate of discount "agreed upon between the parties to the negotiation, "without limit in excess of seven per cent. per annum."

In ruling against the bank the Court of Appeals (74 New York 329) stated:

"In this State the rate of interest on money is limited "to seven per cent., and the Act of Congress consequently "limits the rate of discount to that rate."

It thus appears that the facts present a case within the express law of the State limiting all parties to a fixed rate. There being in New York (so far as our understanding and research extends) no express statutory provision, as

in Arizona and elsewhere, giving parties the right to contract for higher interest, and thereby making, in the fullest sense of Sec. 5197, U. S. Revised Statutes, the rate of interest "allowed" by law that which all persons within the State or Territory might, by express contract, agree upon.

With this wide difference between the law of New York and of the States whose interest laws are similar to that of Arizona, and in harmony with the decisions of whose Courts the Court below has ruled in this case, it is obvious the decisions of these various Courts, and of the Court below herein, may well stand without conflict, express or implied, with this Court's decision in *Bank* v. *Johnson*, *supra*.

Indeed the highest Courts of Colorado and North Dakota, in their cited decisions upon this subject, carefully and fully review the decision of this Court in *Bank* v. *Johnson* and reason therefrom no conflict with their own conclusions, based upon the statute law of their respective States.

Thus, in *Rockwell* v. *Farmers' National Bank of Longmont* (36 Pac. Rep. 905), the Court of Appeals of Colorado concludes its extended review of the decision in *Bank* v. *Johnson* with this pertinent and controlling observation:

"As demonstrated, the case under consideration did not
" come up from a State where there was no statute fixing
" a rate, nor from one where the law fixed one rate, but
" permitted any rate to be charged which might be agreed
" upon between the parties. It came from a State having
" one fixed rate of interest, which, of course, under the
" federal statute, would be conclusive upon the right of
" a national bank. In the next place, it was a statement
" *arguendo* and could only be held to refer to a case where
" the laws of the State were silent."

And continuing, the Court further said :

" The court has been cited to no case expressing a different opinion from that at which we have arrived, while " the cases referred to are in exact accord with our conclusions. Three of the cases present the case in a " somewhat different aspect from the one at bar, but are " very illustrative of this theory of construction. They " were actions upon notes reserving 10 and 12 per cent. " interest, where the general rate was 6, though the parties " by contract were authorized to charge at the rate of 10 " and 12 per centum per annum. It was conceded that 6 " was the general rate fixed by the statute, and that the " other was totally dependent upon the agreement of the " parties; yet the courts held that the national banks " might reserve and receive whatever interest was allowed " by the law of the State regulating the matter. Wiley *v.* " Starbuck, 44 Ind. 298; Newell *v.* Bank, 12 Bush. 57; " Crocker *v.* Bank, 1 Thomp. Nat. Bank Cas. 317, Fed. " Cas. No. 3397. It will be observed that in these cases " the rate was established by the law of the State, and " there was a limit put by the same laws, beyond which " neither individuals nor banks could go. Within the " limits, interest might be reserved. The courts in reaching their conclusion proceeded upon the hypothesis " that, under the national banking act, the bank might " charge any interest allowed by the laws of the State in " which it was organized, even though the rate above 6 " must be the subject of convention, and, unless the limit " were reached, the rate as a rate would not be stated. " This was regarded of no moment in the interpretation " of the statute. It is very plain that if the bank had " reserved 9 per cent., while the respective limits were 6 " and 10, an amount would have been charged in a case " where there was no definite legislation directly authorizing " either the individual or the bank to charge 9 per cent., " other than that flowing from the legislation which made " the matter of interest between the two definite limits a " subject of convention. This distinction does not seem " of very much consequence in the solution of the inquiry.

" If it be true that, in a State where interest may be the " subject of an agreement, the bank may reserve whatever " the parties agree upon up to a maximum, then all " statutes reserving the right of agreement to parties, " whether they name a maximum or not, must be equally " effectual for the purposes of a grant of power.

" The definite question under consideration has been " expressly settled against the appellant in three different " states. Bank *v.* Bruhn, 64 Tex. 571; Hinds *v.* Mar- " molego, 60 Cal. 229; Bank *v.* Stover, *Id.*, 387; Guild *v.* " Bank (S. D.) 57 N.W. 499. These courts conclude that " national banks may charge as high a rate of interest as " is allowed to either individuals or banks of issue in the " various states of their organization. In all states where " there is a statute fixing a rate of interest the only limi- " tation upon this right must be found in the statute it- " self. The restriction contained in the national banking " act which forbade national banks to charge more than " 7 per cent. only, became operative in the absence of " state legislation on the subject. Wherever the state " legislature has acted, the general grant of power to " banks to charge whatever rate might be reserved " either by citizens or banks of issue became operative. " Under this construction, banks in Colorado are placed " on precisely the same footing as individuals. The " legislative act on the subject fixed a rate, to wit, 8 per " cent., and further provided another rate of interest, " which is determined by the agreement of the parties. " That the legislature has failed to say the rate shall not " exceed 12 per cent. per annum, or 5 per cent. per " month, does not destroy the legal effect of the enact- " ment, nor restrict its operations to other banks or " citizens generally, nor make the case one where no rate " of interest is named, whereby the federal limitation " becomes operative. In common with these other " courts which have reached a similar conclusion, we " hold that national banks in Colorado stand on the same " footing in the matter of interest that other banks and " individuals occupy. The defense was unavailable. The " demurrer was properly sustained, and the judgment " will be affirmed."

In *Guild* v. *First National Bank of Deadwood* (57 N. W. Rep. 499) the Supreme Court of South Dakota, in affirming the same rule of equality on part of national banks, pertinently observes (p. 502):

"The authority mainly relied on by counsel for respondent in support of this contention, is the case of *Johnson* v. *Bank* (74 New York, 329), and the same case was taken by writ of error to the Supreme Court of the United States, and reported under the title of *Bank* v. *Johnson* (104 U. S. 271). We have given these two decisions very careful consideration, but we are unable to discover their applicability to the case at bar. It seems to us that the question presented in that case for decision was an entirely different one from the one presented in the case at bar. The highest rate of interest established by law in New York was seven per centum per annum. And no provision was made by law for taking any higher rate by agreement of parties or otherwise. The interest was absolutely fixed and limited by law to a rate not exceeding seven per cent. The National bank, in that suit, took and received interest at the rate of twelve per cent., but claimed it was taken not as interest, but as discount in the purchase of business paper. The Court of Appeals in New York and the Supreme Court of the United States held that, under the National Banking Act, discounting paper was one of its forms of loaning money, and the rate of such loans being limited by the laws of the State of New York, the bank could not take interest in excess of that limit."

These decisions of the State courts, and in the case at bar, stand in entire harmony with the spirit and purpose of the National Banking Act in this regard, as well stated by this Court in *Tiffany* v. *National Bank of Missiouri* (18 Wall. 409).

In that case the law of Missouri limited State banks of

issue to eight per cent. interest charge, but permitted individuals to receive ten per cent. Thereon this Court ruled:

"The position of the plaintiff is, that the general provision of the Act of Congress that National banking associations may charge and receive interest at the rate allowed by the laws of the State where they are located, has no application to the case of these defendants, and that they are restricted to the rate allowed to banks of issue of the State, that is, to 8 per cent. This, we think, cannot be maintained. The Act of Congress is an enabling statute, not a restraining one, except so far as it fixes a maximum rate in all cases where State banks of issue are not allowed a greater. There are three provisions in section thirty, each of them enabling. If no rate of interest is defined by State laws 7 per cent. is allowed to be charged. If there is a rate of interest fixed by State laws for lenders generally, the banks are allowed to charge that rate but no more; except that if State banks of issue are allowed to reserve more, the same privilege is allowed to National banking associations. Such, we think, is the fair construction of the Act of Congress, entirely consistent with its words and with its spirit. It speaks of allowances to National banks and limitations upon State banks, but it does not declare that the rate limited to State banks shall be the maximum rate allowed to National banks. There can be no question that if the banks of issue of Missouri were allowed to demand interest at a higher rate than ten per cent. National banks might do likewise. And this would be for the reason that they would then come within the exception made by the statute, that is, the exception from the operation of the restrictive words 'no more' than the general rate of interest allowed by law. But if it was intended they should in no case charge a higher rate of interest than State banks of issue, even though the general rule was greater, if the intention was to restrict rather than to enable, the obvious mode of expressing such an intention was to add the words 'and

" 'no more,' as they were added to the preceding clause
" of the section. The absence of those words, or words
" equivalent, is significant. Coupled with the general
" spirit of the act, and of all the legislation respecting
" National banks, it is controlling. It cannot be doubted,
" in view of the purpose of Congress in providing for the
" organization of National banking associations, that it
" was intended to give them a firm footing in the different
" States where they might be located. It was expected
" they would come into competition with State banks,
" and it was intended to give them at least equal advan-
" tages in such competition. In order to accomplish this
" they were empowered to reserve interest at the same
" rates, whatever those rates might be, which were al-
" lowed to similar State institutions. This was consid-
" ered indispensable to protect them against possible un-
" friendly State legislation. Obviously, if State statutes
" should allow to their banks of issue a rate of interest
" greater than the ordinary rate allowed to natural per-
" sons, National banking associations could not compete
" with them, unless allowed the same. On the other hand,
" if such associations were restricted to the rates allowed
" by the statutes of the State to banks which might be
" authorized by the State laws, unfriendly legislation might
" make their existence in the State impossible. A rate of
" interest might be prescribed so low that banking could
" not be carried on except at a certain loss. The only
" mode of guarding against such contingencies was that
" which, we think, Congress adopted. It was to allow
" to National associations the rate allowed by the State
" to natural persons generally, and a higher rate, if
" State banks of issue were authorized to charge a higher
" rate. This construction accords with the purpose of
" Congress and carries it out. It accords with the spirit
" of all the legislation of Congress. National banks have
" been National favorites. They were established for the
" purpose, in part, of providing a currency for the whole
" country, and in part to create a market for the loans of
" the General Government. It could not have been in-
" tended, therefore, to expose them to the hazard of un-

" friendly legislation by the States, or to ruinous compe-
" tition with State banks. On the contrary, much has
" been done to insure their taking the place of State banks.
" The latter have been substantially taxed out of exist-
" ence. A duty has been imposed upon their issues so
" large as to manifest a purpose to compel a withdrawal
" of all such issues from circulation. In harmony with
" this policy is the construction we think should be given
" to the thirtieth section of the act of Congress we have
" been considering. It gives advantages to National banks
" over their State competitors. It allows such banks to
" charge such interest as State banks may charge, and
" more, if by the laws of the State more may be charged
" by natural persons."

It must be further remembered and in entire harmony with the spirit of foregoing decision, that the National Banking Act operates throughout the whole United States. In the older States an increasing security affects the loaning power of money in far greater degree than in the extreme West, where, with more limited capital and greater hazard, these two elements, which lie at the foundation of interest charge, justify much higher rates. Hence in those States and Territories where, by express law, the right of individual contract in respect to rate of interest is expressly established, there should be such application of the National Banking Act as will give parties doing business thereunder equal advantage with respect to their neighbors, whether private banks or individuals, in competition for the transaction of the banking business. Such is the true and clear intendment of the National Banking Act as expounded by this Court in the case just cited, *supra*, at length. Under such conditions, and to permit National banks to do business, it should not be ruled that because in a case arising under the laws of New York, where there is no express statutory power to charge or receive a rate

of interest in excess of a named per centum, the rule of construction announced in *Bank* v. *Johnson* must likewise control in those States and Territories where express authority to covenant for higher rate of interest *is* given by the written law. The National Banking Act affords to the entire country a method of safe banking under Federal control, which is as essential in one part of the Union as in another. But to force a construction from the National Banking Act which would, under the circumstances here disclosed, bar a national bank in Arizona from doing business on equal footing with other banks or individual lenders of money, would be to create an unnecessary bar and greatly cripple their operations. Higher rates of interest obtain when through scarcity of money and resulting inconvenience in parting therefrom by the lender is combined the increased hazard in respect to the security furnished therefor. These are general conditions throughout much of the Western territory. They have been of long continuance, and were well known to Congress when the National Banking Act was passed. It does not comport with sound reasoning to suggest that Congress advisedly created corporations with banking functions and sent them out to compete in their business with such restrictions upon the earning power of their capital as to put them at constant disadvantage with State banks or individuals who are left wholly unfettered in this regard.

In commenting upon these provisions of the National Banking Act, this Court, in *Farmers' National Bank* v. *Deering* (91 U. S. 29), pertinently said (p. 35):

"There was reason why the rate of interest should be "governed by the law of the State where the bank is "situated."

But we submit there can be no just reason to affirm the

rule here urged against us, whereby *part* only of the law of Arizona, with respect to interest, would be so applied, and national banks therein thus put on inequality with all other banks or individuals. Or, to state the case in most pointed form, where, under the laws of Arizona (Sec. 2162 R. S. Ariz.), "parties may agree in writing for "the payment of any rate of interest whatever on money "due or to become due under any contract," etc., and the parties in present cause *have* so agreed, it is plain that the rate of interest thus fixed is fully "allowed" by the law of the Territory within the full meaning of Section 5197, U. S. Rev. Stats. The broad, clear, purpose of that section is to prohibit national banks from violating the interest laws of the State or Territory in which they are doing business. As such banks are wholly under federal control, and could not be reached by State law in this regard, the limitation as found in the Revised Statutes ought not to be so applied as to make unlawful thereunder what is by local statute perfectly lawful between the lender and the borrower.

Otherwise stated, there is no possible ground for appellants' claim that under the laws of Arizona the agreement to pay ten per cent. was usurious or forbidden. On the contrary, it was directly authorized. When the local law thus "allowed" the rate of interest here agreed on, it is, we submit, a strained and unreasonable construction of Section 5197 to insist that by the terms of that section alone, the taking of interest at a rate perfectly lawful under the laws of Arizona, with respect to all other parties, has thereby become unlawful with respect to this national bank. On the contrary, whatever is lawful by way of interest charge under the local law was intended by the banking act to be extended to the banks created thereunder, and such, we take it, was the clear meaning of this

Court in *Bank* v. *Deering*, *supra*, when it distinctly affirmed that "the rate of interest should be governed by "the law of the State where the bank is situated."

II.

Appellants' Alleged Counter-Claim.

All of appellants' extended argument on this head reaches the sole contention, in legal effect, that they are entitled to judgment upon their counter-claims, so called, because the appellee bank, as defendant, did not, in its plea of denial thereof, verify same by oath.

Responsive to the whole of that contention, as made in the Supreme Court of Arizona, the opinion of that Court (Rec. 141) rules:

"The general denial made by the defendant in error by "way of reply to the counter-claims set up in the answers "of the plaintiffs in error was sufficient, although not "verified, to put the plaintiffs in error upon proof except "as to any matter pleaded therein which by paragraph "735, Revised Statutes, is required to be denied under "oath. An examination of the matters pleaded by way "of counter-claim in the answers of plaintiffs in error "discloses that none of those are matters which are "required to be verified by said paragraph, except the "allegation contained in the first counter-claim attempted "to be set up, founded upon the assignment of the note "by P. P. and W. A. Daggs to A. J. Daggs. It is alleged "that the note was assigned by the bank to Daggs by an "instrument in writing. As to this allegation, possibly "under subdivision five of said paragraph 735, under the "general denial unverified by the oath of the defendant "in error, the assignment should properly be taken as "admitted. To warrant a recovery, however, something "more than the proof of the assignment of the note to

" Daggs was needed. While our statutes recognize the " right of an assignee to hold the indorser of a non- " negotiable chose in action as surety for the payment of " the same, no recovery is authorized without it be shown " that the assignee had used due diligence to collect the " same. Par. 123, 124, R. S.

" Again, an examination of this pleading shows that it " fails to state a cause of action. A counter-claim must, " to be good, contain every allegation which would be " needed in a complaint founded on the same cause of " action. The only allegations which are made in this " counter-claim are that the bank assigned a non-negoti- " able promissory note, past due, to A. J. Daggs, and " that at the time of the assignment the makers were " insolvent and were still insolvent, and that the same " had not been paid. No allegation is made that due " diligence was used, as required by the statute, or that " any effort was made to collect the same. This omission " in the pleadings is doubly fatal, for the reason that the " note appears, from an indorsement upon its face, to " have been secured by chattel mortgage of even date " therewith. With this endorsement thereon, the mere " allegation of the insolvency of the makers of the note " was not sufficient to charge the endorser as a surety " without an allegation of the exercise of due diligence " to collect the same and to enforce the security, and a " failure, after such effort, to collect the same. The " motion for judgment upon this counter-claim was not " only properly denied by the court below, but had no " reply been filed by the defendant in error the facts " pleaded were not sufficient to support a judgment " thereon. The judgment of the lower court is affirmed."

In thus ruling the Court assumes that there may have been liability on part of appellee bank to these appellants on their failure to collect the note made the basis of the counter-claim. But neither in its opinion nor certified statement of facts is there any finding or suggestion that upon the facts the appellee bank was so liable as endorser

or transferrer of this chose in action. The appellants did so plead such liability, but the appellee bank as distinctly denied it. The opposing counsel admit that the question of *fact* was tried in the Court of first instance; the foreclosure judgment, which is part of the certified statement of facts from the Supreme Court of the Territory (Rec. 160), distinctly recites that testimony was presented and considered by the Court from both sides, and "upon the pleadings and proceedings" in the three causes which were tried there and consolidated by stipulation, judgment of foreclosure, as prayed by the bank, was duly entered.

In the absence of any findings of fact as resulting from the testimony thus introduced, we submit, with confidence, that this Court cannot now conclude that issue was not fully joined; testimony taken; and judgment thereon fully rendered by the trial Court with respect to the merits of appellants' counter-claim and the defense of the appellee bank thereto.

The same conclusion must obtain with respect to the other and distinct grounds of appellants' alleged counter-claim arising from the asserted failure of the appellee bank to permit the use of its name on appeal to this Court, in the litigation involving the note made the basis of such counter-claim. In other words, in the present state of the record, it must be justly assumed that on this alleged claim the trial Court was fully apprised by the evidence, and rendered its judgment in the light thereof. *Unless* this Court shall go outside the certified statement of facts and examine this entire transcript, we submit the foreclosure judgment, by its recitals, must conclude further inquiry here. As suggested at the outset, appellants' counsel has assumed that the appeal to this Court has opened the entire transcript of record, including all testimony, and set at large all questions which were heard and

determined in the first instance by the trial Court, but which were not reviewed on appeal by the Supreme Court of the Territory. To argue the case in this fashion is indeed anomalous. Appellants have wholly failed to comply with the Practice Act of Arizona; that failure has restricted the highest Court of the Territory to a review of only two questions as set forth at length in its opinion, and as certified to this Court in response to the writ of certiorari. Yet, having thus presented and argued their case in the Supreme Court of the Territory, appellants now seek to open wide the entire record in this Court, and argue the case upon the theory that your Honors will ignore the statement of facts certified by the Supreme Court of Arizona; ignore also the plain limitations upon the powers of review of this cause imposed upon that Court by appellants' own course of action, and will here search the entire record and listen to all assignments of error as fully and completely as if the appeal had brought up the entire transcript, without necessity, by statute or otherwise, for certified findings. As suggested at the outset, we cannot follow counsel in any such wide excursion, based upon such impossible premises. Our sense of propriety must plainly forbid.

The opinion of the Court below, quoted at length *supra*, on this head, distinctly rules that under the Practice Act of Arizona, the counter-claim was fatally defective as plead and required no answer from the appellee bank, because not stating facts sufficient to support an independent judgment against it.

With all respect, we submit that the construction thus given the Practice Act of Arizona by the Supreme Court of the Territory, is entitled to that conclusive consideration which is given to the construction of State laws and State practice by the highest Courts of the State when causes are brought in review therefrom to this Court.

Set-off and counter-claims are matters wholly unknown to the common law or the common-law system of pleading. They are creations of statute, and such statutes are as different as the different views of the separate legislatures of the States and Territories have deemed it proper to prescribe.

If we were here dealing with matter of common law, the application thereof to this case by the Court below would undoubtedly be open to the fullest consideration in this Court, and to reversal on error, but we fail to understand why the interpretation given by the Court below to the Practice Act of Arizona in dealing with these Statutory claims or defenses created thereby should not be accorded here as full and conclusive effect as if the Court were now sitting in review of a cause embracing like questions coming from the highest Court of a State. There is no suggestion that the Supreme Court of Arizona has here applied any rule of construction of its own Practice Act, different from any prior adjudication or ruling of that Court. Under such circumstances, we submit that the highest Court of Arizona should be treated with all the respect which is accorded to the highest Court of the States in the interpretation of local statutory law. Certainly the rule may well be invoked to this effect in respect to matters of pure pleading and practice.

And finally, on this head, it may be justly observed that *if* the ruling of the Court below on this point is subject to proper review here, then it must be remembered that the judgment of the trial Court, as appears in this record, was *not* based upon the pleadings alone, but upon the testimony and entire proceedings in the cause. *If* the denial of the appellee bank to the alleged counter-claims of the appellants was not under oath when it should have been, the parties went to trial in that state of the plead-

ings, the Court heard all the testimony offered on both sides, and it should hence be conclusive here to suggest that under such circumstances, and with no findings of fact directed to this point, the trial Court did enter judgment of foreclosure, and hence necessarily found appellants' counter-claims not supported by the evidence submitted thereon.

In thus acting the Court was in accord with the general practice. In *Randolph* v. *Mayor, etc., of New York* (53 How. Pr. N. Y. 68) it was held that a defendant waives the advantages derived from the failure of the plaintiff to reply, if he goes into proof of the counter-claim and by such proof shows that it could not properly have been set-off against the plaintiff's demand.

In *Am. & Eng. Ency. of Law* Vol. 22, Title "Set-Off," pp. 429-430, the general rule is clearly stated thus:

"By a failure to support a counter-claim by proof, "however, the defendant loses the benefit of an admission "by failure to reply, and the objection that the facts set "up as a counter-claim do not constitute a cause of action, "or that the cause of action thus set up is one of which "the Court has no jurisdiction, is not waived by a failure "to reply."

We hence submit that the Supreme Court below ruled correctly (1) both in holding the appellee bank's reply to the appellants' counter-claims sufficient in form, and (2) in further holding that, under the counter-claim as stated, no reply was necessary.

III.

Appellee Bank not Liable as Assignor.

Opposing counsel assumes such liability, and from that premise argues at length in avoidance of the obligation of

due diligence on part of the appellants against the makers of the note made the basis of their counter-claim. If the Court shall consider this counter-claim in any view, it is essential to so consider it in connection with the written assignment (Rec. 27) under which alone this note was transferred. The separate pleadings of appellants (Rec. 21–24) set out this non-negotiable note as payable to Thomas Armstrong, Jr., and by him alone endorsed. Manifestly, if taken by appellants from appellee bank in that form it would alone have (1) neither conveyed title, nor (2) imposed liability on part of the bank as endorser or otherwise. It is hence impossible to consider the matter of this counter-claim in this regard (which is by no means conceded to be open to consideration here on present record) without bringing into view and full consideration the assignment and transfer of this note and its accompanying securities. (Rec. 27.)

Analysis of that contract or agreement shows that, in stated consideration of the notes given by appellants and accompanying mortgages, the appellee bank "have sold, "assigned, transferred and set over unto the said A. J. "Daggs all their right, title, and interest in and to a "certain promissory note signed by W. A. Daggs and P. "P. Daggs, as partners, doing business under the firm "name and style of W. A. & P. P. Daggs, and W. A. & "P. P. Daggs, individually, for five thousand dollars "($5,000.00)," secured by a stated mortgage upon certain sheep.

By this assignment the appellee bank clearly transferred, by quit-claim, all its "right, title and interest" in the note described WITHOUT any guaranty whatever in respect to payment thereof. As non-negotiable paper it was, in legal effect, simply a chose in action. Had it been a negotiable note, the rule under the law merchant would have been the same.

Thus, in *Lyons* v. *Divelbis* (22 Pa. St. 185), a negotiable note was assigned thus:

"I assign the above note to Johnson Divelbis."

And on suit by the latter against the assignor (Lyons) the Court well ruled:

"Every endorsement of a promissory note includes in "it an assignment, but an assignment is not necessarily "an endorsement. The Statute of 3 and 4 Anne, Chap. "IX, distinguishes between the two methods of transfer, "when it authorizes the holder, whether by *endorsement* "*or assignment*, to bring an action in his own name "against the *maker* or *endorser*. No action is given by "the statute against the assignor. An endorsement is an "authority to the holder to write over the signature an "order upon the maker in the nature of a bill of exchange. "It is a commercial transaction, and the law merchant "fixes the measure of liability as in bills of exchange. "An assignment of a chose in action is in strictness un-"known to the common law. It is, however, recognized "in equity, and transfers to the holder the rights of an "assignor, at a price presumed to be no more than equal "to the value of the claim against the maker, taking into "consideration his character for punctuality, and his "ability to pay. On such a transfer the assignor is re-"sponsible for nothing but the genuineness of the claim. "The instrument on which this action was brought is a "transfer, of the description last mentioned, written upon "a note overdue at the time. On this there is no resort "for indemnity against the insolvency of the debtor."

In *Am. and Eng. Ency. of Law*, 2d Ed., Title "Assignments," p. 1091, it is said:

"In some jurisdictions it is held that the assignment of "a chose in action, such as a bond or judgment, does not "imply a warranty that it will be paid, and the assignor

" will not be liable to the assignee on default of the " debtor, unless he has rendered himself liable by an ex- " press contract, or has been guilty of fraud."

A large number of cases are cited in the foot-note supporting this statement of the text.

The text adds:

" In other jurisdictions, however, it is held that the " assignor of a non-negotiable obligation for the payment " of money will be liable to the assignee, in case the latter " is unable to recover from the obligor, after the exercise " of due diligence, at least to the extent of the considera- " tion paid for the assignment. But the assignee cannot " proceed against the assignor until he has exercised due " diligence in an unsuccessful attempt to recover from the " obligor."

And in the foot-note a few decisions, sustaining this doctrine, rendered in Kentucky, Virginia, and West Virginia are cited.

We submit the rule which relieves the assignor from such obligation on non-negotiable paper " unless he has " rendered himself liable by an express contract, or has " been guilty of fraud," is sound and preferable.

The two cases last cited, *supra*, sustain the latter doctrine, and among the numerous additional authorities given in the note in support thereof, we cite, as illustrative, *Stout* v. *Stevenson* (4 N. J. Law Rep. 178), which involved an action against the assignor on a bond reading thus:

" I do sign all my right and title, interest and claim of " this within note to William Stevenson, and guarantee " the payment thereof."

Thereon the Court observed:

"A simple assignment, therefore, subjects the assignor " to no other responsibility than the simple sale of any

" other property, but if to the assignment he adds a war-
" ranty, or, as it is here expressed, guarantees the pay-
" ment in general terms, that warranty or guarantee is
" absolute and co-extensive with the instrument itself."

So in *Kirkpatrick* v. *McCollough* (3 Humph. 171), it was held that the endorser of paper not negotiable is only responsible when he specially contracts to be so, or where he transfers the paper fraudulently; and in the latter case not upon the endorsement but by special action for the consideration paid by the endorsee.

Referring again to the written assignment here involved (Rec. 27), it will be further noted how fully and justly this rule should here apply. Therein, after the words " have sold, assigned, transferred, and set over unto the " said A. J. Daggs all their right, title, and interest" in and to the promissory note in question, the instrument proceeds to state that the note is in litigation between the appellee bank and named parties, to determine priority of certain mortgages, and such cause of action and rights of the appellee bank therein are by the instrument " also " hereby sold, assigned, transferred, and set over" unto A. J. Daggs, &c.

Upon the face of this agreement it is therefore clear that appellants took this non-negotiable note, the mortgages given as security therefor, and the right of action then pending by the *same* instrument, under the *same* assignment, as one transaction, and necessarily thus took the right, title, and interest only of the appellee bank therein. In other words, these appellants bought a lawsuit; taking therewith overdue paper, and assuming all chances in payment or the results of the litigation respecting the property given as security therefor. In such an instrument, therefore, the absence of any form of guarantee by the appellee bank is significant and convincing that all

the bank intended to do and did do was to transfer whatever interest it had in this overdue paper and underlying security.

Manifestly, the implied warranty was of its title to the note and its right to receive payment thereon from the makers thereof, but the warranty did not imply anything beyond in respect to payment, or the absolute priority of the security transferred with the note by the same instrument. In this situation it is impossible to conclude that the bank, in fact or law, assumed an obligation to make good to these appellants their failure to recover the amount of the note, either from the makers thereof or the property pledged under the mortgage given to secure its payment. Much is made in argument of the averments in the appellants' counter-claim that when this assignment was made by the appellee bank to these appellants, the makers of the note (W. A. Daggs and P. P. Daggs) were actually and notoriously insolvent, and extended argument is submitted to show that under such circumstances no diligence was required from appellants in seeking primary recovery from them. We fail to apprehend the relevancy of such argument. The paper was overdue. The insolvency of the makers must have been as well known to their two brothers (these appellants) as to the bank. They were seeking to make a settlement with the bank whereby this obligation of W. A. and P. P. Daggs to the bank could be *extinguished* as against the bank by this renewed indebtedness, and the mortgages given thereunder, which are the subject-matter of these foreclosure suits. *If* it is possible to hold the assignor of non-negotiable paper or chose in action responsible in any case, the rule can certainly have no application in case at bar, under the plain facts, and the plain inference to be justly drawn therefrom. Excluded from the consideration of the tes-

timony by every proper rule of procedure here, it must be well inferred that the trial Court committed no error of fact or law in passing upon this counter-claim.

IV.

Alleged Failure of Bank to Continue Litigation.

Reply to appellants' extended argument on this point can be briefly made. The contract or agreement (Rec. 27) above described concludes with this provision with respect to the action then pending to enforce the mortgage given to secure the Daggs' note:

"It is further agreed that the aforesaid cause of action "described shall be continued in the name of the Phœnix "National Bank until the case is determined and settled, "but it is further agreed that from this date, November "1, 1894, A. J. Daggs shall pay the costs that shall here- "after accrue in the said cause."

In the alleged counter-claim as plead, these appellants lustily declare that the appellee bank committed breach of its agreement on this head by refusing to sign cost bond on appeal to the Supreme Court of the United States, *long after* this agreement was made. There is no suggestion in such pleading or counter-claim that the bank was tendered indemnity, by way of bond or otherwise, against the costs and damage which it would have primarily assumed on such appeal to this Court, *if* it had signed the bond so tendered. Admitting its refusal to sign such bond, under advice of counsel, we submit such advice was wisely given, and that the bank acted within its clear, legal right. The giving of the cost bond by the bank was not necessary, for in *Brockett et al.* v. *Brockett* (2 How. 238), it was long since ruled that—

" It is sufficient if the appeal bond is approved by the " Court, as satisfactory and complete security, by whom- " soever it may be executed."

But if the bank was a necessary party, as principal obligor on such appeal bond, then, under the very terms of its agreement with these appellants, the bank could not be asked nor called upon to execute such an obligation, without being tendered full security or indemnity therefor. There is no averment in all the pleadings of these appellants that they tendered such security or indemnity at any time or in any form.

V.

R. E. Daggs' Claim of Suretyship.

This merits only brief attention. He is nowhere so described in this record until he appeared with his answer on the morning of the day of trial. Summons issued on these foreclosure suits on February 21, 1896 (Rec. 6). The separate answer of R. E. Daggs is noted as sworn to October 12, 1896 (Rec. 10). The judgment in the trial Court recites that trial was had on the same day (Rec. 73).

The law of Arizona, under which Daggs claims the right as surety to have his suretyship first tried, distinctly provides that it shall not thereby delay the plaintiff's trial. The original answer of both these appellants (Rec. 7) discloses no suggestion from R. E. Daggs that he then claimed the position of surety. *Contra*, he joined with his co-defendant by such original answer (1) in excepting to the sufficiency of the complaint, and (2) as further answer, " denies each and every allegation therein contained, " *except the execution of the instrument sued on.*" That answer remained of record, unchanged and unamended, until the very day of the trial, when, for the first time, R.

E. Daggs sought to plead as surety only. His original mortgage to the bank (Rec. 3) recites the consideration of one dollar, and as security for the three promissory notes of A. J. Daggs therein described, "and for other and "further valuable considerations 'to me in hand paid "by the Phœnix National Bank," etc.

The record thus estops his claim of suretyship by the recitals of his own mortgage and his original plea. It sufficiently answers also the argument of counsel that we did not prove at trial the execution of the mortgage given by R. E. Daggs to the bank on which the foreclosure suit against him was based. In his subsequent separate answer R. E. Daggs assumes his execution of the mortgage and makes no suggestion in denial thereof (Rec. 20).

VI.

The Water Stock.

While the appellants' argument on this head is in no sense pertinent here, we suggest in reply:

1. The appellants' separate answers concede that this water stock was pledged as collateral and additional security for the promissory notes given by appellant A. J. Daggs to the appellee bank. Until the debt is satisfied the bank properly retains a lien thereon and resulting custody of the stock. Clearly conversion cannot be predicated upon such conditions.

2. The matter is pleaded by way of *defense* and not as counter-claim, as imspection of the pleadings will show. (Rec. 21, par. III; Rec. 26, par. VII.)

3. Appellee's counsel admitted on the trial such collateral holding and offered to deposit the stock with the clerk of the Court for surrender on satisfaction of the

appellants' indebtedness to the bank through sale of the mortgaged realty (Rec. 57).

Manifestly the point is without merit.

VII.

Alteration in the mortgage is alleged. The contention is without merit; and the charge of fraud or design therein on part of appellee is both untrue and unsupported by any evidence.

Equally without merit is the assertion of misdescription in the mortgage given by appellant R. E. Daggs. Inspection of that mortgage (Rec. 3) discloses its full recital that the lands covered thereby all lie in Maricopa County, Arizona, and the further description by section, township, and range of each tract therein described renders its locus certain.

Foregoing slight digression from the reviewable record is justified solely by desire not to concede, by entire silence, the merit of appellants' argument. Their case is without merit, and were the record here in proper condition we could properly and completely answer all argument now advanced by appellants. Conscious that such further reply would subject us to just censure, we ask that silence shall not be taken as in any sense an admission of the correctness in fact or law of any part of appellants' assignment of errors or the brief submitted thereon. Upon the record as now open for review in this Court we submit all presumptions attend the correctness of the judgment below and that in every proper view it should be here affirmed.

Respectfully submitted.

ALDIS B. BROWNE,
ALEX. BRITTON,
Attorneys for Appellee.